

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDNA M. BROWN)	
Claimant)	
VS.)	
)	
THE BOEING COMPANY)	Docket No. 180,764
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent and its insurance carrier appeal from the Award entered by Administrative Law Judge John D. Clark, dated January 27, 1997. The Appeals Board heard oral arguments on August 8, 1997, in Wichita, Kansas.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared on behalf of claimant. Eric K. Kuhn of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. Kurt W. Ratzlaff of Wichita, Kansas, appeared on behalf of the Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award and has adopted the stipulations listed in the Award. Also, at oral argument it was stipulated and agreed by the parties that the Workers Compensation Fund should be dismissed. This agreement was also set forth in respondent's submission letter to the Administrative Law Judge. The Award did not list the Workers Compensation Fund as a party in the case caption, but it did show the appearance of counsel for the Fund. For the purposes of clarifying the record, the Kansas Workers Compensation Fund is hereby dismissed.

ISSUE

The sole issue on appeal is whether timely written claimant was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be reversed. Claimant failed to timely serve written claim for compensation under K.S.A. 44-510a(a) (Ensley).

Claimant alleged a series of work-related accidents from September 1991, through March 10, 1992. For purposes of award, the Administrative Law Judge found claimant's date of accident to be March 10, 1992, her last day of employment with respondent. That finding was not appealed. Therefore, for the purposes of determining whether claimant's written claim was timely served, claimant's accident will be treated as having occurred on March 10, 1992.

K.S.A. 44-520a(a) (Ensley) provides for written claim to be served within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) (Ensley) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection c of K.S.A. 44-557 (Ensley) provides:

“(c) No limitation of time in the workmen's compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced before the director within one (1) year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.”

The parties agree that claimant's written claim was served more than 200 days but less than one year from her date of accident. The Administrative Law Judge found, “No accident report was filed by the Respondent therefore the Claimant had one year to file her written claim.” Claimant argues that the Administrative Law Judge should be affirmed because she gave timely notice of accident to a supervisor and respondent failed to file a report of accident with the Division of Workers Compensation. Accordingly, claimant contends the time for serving written claim was extended by K.S.A. 44-557 (Ensley) to one year.

Respondent argues that claimant is precluded from invoking the provisions of K.S.A. 44-557 (Ensley) for three reasons. First, claimant has not met her burden of proving that respondent did not file a report of accident. Second, claimant should be estopped from alleging that she gave proper notice of her accident to her supervisor under the doctrine of equitable estoppel. Third, claimant must prove incapacity to invoke the provisions of K.S.A. 44-557 (Ensley).

The Appeals Board agrees that claimant has not met her burden of proving that respondent was required to file an accident report and failed to do so. K.S.A. 44-557(a) (Ensley) provides:

“(a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee’s employment and of which the employer or the employer’s foreman has knowledge, which report shall be made upon a form to be prepared by the director, within twenty-eight (28) days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.”

The record does not establish that claimant missed any work or was otherwise incapacitated “from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.” Claimant left work due to an economic layoff unrelated to her injuries. Under such circumstances the employer was not required to file a report of accident with the Director and the provisions of K.S.A. 44-557(c) (Ensley) do not apply to this claim. Therefore, because the provisions of K.S.A. 44-557(c) (Ensley) extending the time period for serving written claim cannot be utilized, and because claimant failed to serve written claim within 200 days as required by K.S.A. 44-520a (Ensley), her claim is time-barred.

“In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends.” K.S.A. 44-501(a) (Ensley).

K.S.A. 44-508(g) (Ensley) provides:

“‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”

In this case, it was the claimant’s burden to prove that respondent was required to but did not file a report of accident. The record is completely bare on this point. Therefore, the provisions of K.S.A. 44-557 (Ensley) cannot be employed. As written claim was made beyond 200 days from the date of accident, claimant is time-barred.

Based upon the above, the Appeals Board does not reach the question of whether the Appeals Board should take official notice of the presence or absence of an employer’s report of accident in the files of the Division. Neither do we reach the question of whether or not the doctrine of equitable estoppel should be applied to a workers compensation proceeding and to the facts in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated January 27, 1997, should be, and is hereby reversed.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tom E. Hammond, Wichita, KS
Eric K. Kuhn, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director